BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

SNOHOMISH COUNTY FARM BUREAU,

Petitioner,

v.

SNOHOMISH COUNTY AND WASHINGTON STATE DEPARTMENT OF ECOLOGY,

Respondents.

**CASE No. 12-3-0008**
*(SCFB I)*

**FINAL DECISION AND ORDER**

## *SYNOPSIS*

Snohomish County's Shoreline Master Program was updated through the County's adoption and the Department of Ecology's approval of Amended Ordinance 12-025. The restoration measures authorized by the SMP include dike and levee removals that may result in inundation of prime farmlands designated as natural resource lands under RCW 36.70A.170. The Snohomish County Farm Bureau challenged the County's action and Ecology's approval on various grounds.

The Board found the Farm Bureau was not able to meet its burden of proof for non-compliance, due, in part, to the narrow scope of Board review for SMPs concerning shorelines of statewide significance and to the limitation on review for regulatory consistency in RCW 90.58.190(2)(b) and (c). The Petition was dismissed.



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## I. PROCEDURAL BACKGROUND

Petitioner Snohomish County Farm Bureau challenges Snohomish County's adoption and the Department of Ecology's approval of Amended Ordinance 12-025, adopting the 2012 update to Snohomish County's Shoreline Management Program (SMP Update).[1]

In accordance with the case calendar for motions, the parties filed cross-motions for dispositive determination of Legal Issues 2 and 4. The Board issued its Order on Motions December 17, 2012, dismissing Legal Issues 2 and 4 pursuant to WAC 242-03-560. The Board reserved decision on the Farm Bureau's motion to supplement the record and on the Respondents' motion to strike.[2]

The parties subsequently filed prehearing briefs and exhibits, as follows:

- Petitioner's Opening Brief, January 2, 2013
- Snohomish County's and Washington State Department of Ecology's Joint Prehearing Response Brief, January 23, 2013 (Respondents' Brief)[3]
- Petitioner's Reply Brief, January 10, 2013

The Hearing on the Merits was convened February 11, 2013, at the Snohomish County Administrative Building. Present for the Board were Margaret Pageler, Presiding Officer, and William Roehl.[4] Petitioner Snohomish County Farm Bureau appeared by its representative Edwin F. Moats. Snohomish County was represented by Deputy Prosecuting Attorneys Justin Kasting and John Moffat. Washington State Department of Ecology was represented by Assistant Attorney General Sonia Wolfman. Leslie Sherman of Buell Realtime Reporting provided court reporting services.

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[1] Snohomish County's shoreline master program is entitled Shoreline Management Program.
[2] These matters are addressed below under Preliminary Matters.
[3] Respondents' Brief, at 40-41, contains a motion to strike six exhibits attached to Petitioner's Opening Brief. The motion is addressed below under Preliminary Matters.
[4] Board panel member Cheryl Pflug was not able to attend the hearing. Pursuant to WAC 242-03-050(2), she has reviewed the transcript of the hearing (hereafter, HOM Transcript).



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The hearing provided the Board an opportunity to ask questions clarifying important facts in the case and providing better understanding of the legal arguments of the parties.

## II. JURISDICTION, SCOPE AND STANDARD OF REVIEW

### A. Board Jurisdiction

The Board finds that the Petition for Review was timely filed, pursuant to RCW 36.70A.290(2) and RCW 90.58.190(2). The Board finds that Petitioners have standing to appear before the Board, pursuant to RCW 36.70A.280(2).[5] The Growth Management Act gives the Board jurisdiction to review adoption and approval of Shoreline Master Programs to determine whether they are in compliance with the Shoreline Management Act. RCW 36.70A.280(1)(a). The Board finds that it has jurisdiction over the subject matter of the petition pursuant to RCW 36.70A.280(1)(a).

### B. Burden of Proof, Scope and Standard of Review

Appeals of shoreline master programs are governed by the Shoreline Management Act, Chapter 90.58 RCW (SMA). RCW 90.58.190. The appellant has the burden of proof in the appeal of a SMP. RCW 90.58.190(2)(d).

The Shoreline Management Act differentiates "shorelines" and "shorelines of statewide significance."[6] The scope and standard of GMHB review for **shorelines** is set forth in RCW 90.58.190(2)(b) which provides:

> If the appeal to the growth management hearings board concerns **shorelines**, the growth management hearings board shall review the proposed master program or amendment solely for compliance with the requirements of this chapter, the policy of RCW 90.58.020 and the applicable guidelines, the internal consistency provisions of RCW 36.70A.070, 36.70A.040(4), 35.63.125, and 35A.63.105, and chapter 43.21C RCW as it relates to the adoption of master programs and amendments under chapter 90.58 RCW.[7]

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[5] The Order on Motions (Dec. 17, 2012) decided a challenge to the Farm Bureau's standing to raise Legal Issue 4.
[6] Defined at RCW 90.58.030(e) and (f) respectively.
[7] Emphasis added.



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For **shorelines of statewide significance**, RCW 90.58.190(2)(c) provides:

> If the appeal to the growth management hearings board concerns a **shoreline of statewide significance**, the board shall uphold the decision by the department unless the board, by clear and convincing evidence, determines that the decision of the department is inconsistent with the policy of RCW 90.58.020 and the applicable guidelines.[8]

Under these two subsections of RCW 90.58.190(2), the parameters of review by the Growth Management Hearings Board are different based on whether the appeal concerns "shorelines" or concerns "shorelines of statewide significance."[9] The terms "shorelines" and "shorelines of statewide significance" have mutually exclusive definitions.

Under RCW 90.58.030(2)(g), "shorelines of the state" are the total of all "shorelines" and "shorelines of statewide significance" within the state. The statutory term "shorelines" is defined in RCW 90.58.030(2)(e) to include all of the water areas of the state and their associated shorelands except "shorelines of statewide significance."[10] The "shorelines of statewide significance" are identified in RCW 90.58.030(2)(f).

Standard of Review. To the extent the appeal concerns "shorelines" – i.e., those not of statewide significance – the "board shall find compliance unless it determines that the action by the state agency, county, or city is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of the [GMA]." RCW 36.70A.320(3). To find an action clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been committed."[11]

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[8] Emphasis added.

[9] As a creature of statute, the power and authority of the GMHB is limited to review of those matters expressly delegated by statute – the GMHB has only those powers expressly granted or necessarily implied by statute. *Viking Properties, Inc. v. Holm,* 155 Wn. 2d 112, 129, 118 P.3d 322 (2005); *Skagit Surveyors and Engineers, LLC v. Skagit County,* 135 Wn. 2d 542, 564, 958 P.2d 962 (1998).

[10] Also excepted are stream segments upstream of a mean annual flow of 20cfs and lakes less than 20 acres, with their associated wetlands. RCW 90.58.030(e)(ii) and (iii).

[11] *Lewis County v. WWGMHB ("Lewis County"),* 157 Wn.2d 488, 497-98, 139 P.3d 1096 (2006) (citing to *Dept. of Ecology v. PUD District No. 1 of Jefferson County,* 121 Wn.2d 179, 201, 849 P.2d 646 (1993)); See also, *Swinomish Tribe, et al v. WWGMHB,* 161 Wn.2d 415, 423-24, 166 P.3d 1198 (2007).



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When an appeal concerns a "shoreline of statewide significance," Ecology's decision to approve the SMP will be upheld "unless the board, by clear and convincing evidence, determines that the decision of the department [Ecology] is noncompliant with the policy of RCW 90.58.020 or the applicable guidelines." RCW 90.58.190(2)(c). As the Board explained in *Confederated Tribes & Bands of the Yakama Nation v. Yakima County*,[12] the Legislature has "narrowed the scope" of review and "prescribed a high evidentiary standard" of "clear and convincing evidence" when an appeal concerns a shoreline of statewide significance. Clear and convincing evidence "requires that the trier of fact be convinced that the fact in issue is 'highly probable,'" which means "clear, positive and unequivocal in [its] implication." *Colonial Imports, Inc. v. Carlton NW., Inc.*, 121 Wn.2d 726, 735, 853 P.2d 913 (1993) (internal citations omitted).[13] This high evidentiary standard is consistent with "the enhanced protection of the statewide interest over the local interest" when a shoreline of statewide significance is at issue.[14]

Scope of Review. RCW 90.58.190(2) also defines the scope of the Board's review of a Shoreline Master Program. SMP provisions concerning "shorelines of statewide significance" are reviewed solely to determine whether Ecology's decision approving the SMP "is noncompliant with the policy of RCW 90.58.020 or the applicable guidelines." RCW 90.58.190(2)(c). Board review of SMP provisions concerning "shorelines" must also determine compliance with SMA requirements, with SEPA procedures, and with "the internal consistency provisions of RCW 36.70A.070, 36.70A.040(4), 35.63.125 and 35A.63.105." RCW 90.58.190(2)(b).

In either case, the Board's review includes a determination of compliance with the applicable guidelines. RCW 90.58.190(2)(b) and (c). Pursuant to RCW 90.58.200 Ecology

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[12] EWGMHB Case No.10-1-0011, Final Decision and Order (Apr. 4, 2011), at 4.
[13] See also, *Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 531, 998 P.2d 856 (2000) (The clear and convincing standard requires evidence "so clear, direct, weighty, and convincing as to enable the jury to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.")
[14] *Yakama Nation*, EWGMHB 10-1-0011, at 4 n.8.



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has adopted guidelines to assist jurisdictions in the development of their SMPs. Ecology's SMP regulations are found at WAC 173-26 (hereafter, SMP guidelines). Deference to Ecology's interpretation of the SMP guidelines is appropriate because WAC 173-26 is Ecology's own regulation. *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 86, 11 P.3d 726 (2000).

In the present matter, none of the parties pointed to facts in the record establishing which shorelines at issue in this dispute are shorelines of statewide significance.[15] None of the participants have provided the Board with any authorities addressing the application of these differing scopes and standards when the appeal includes both "shorelines" and "shorelines of statewide significance," as in the present matter.[16] Given the strong state interest in protection of shorelines, Ecology ought at minimum to provide the Board with the department's delineation of shorelines of statewide significance to guide the Board's application of the proper scope and standard of review.

## III. PRELIMINARY MATTERS

### A. Supplementation of the Record and Motions to Strike

The Farm Bureau filed a timely motion to supplement the record[17] with three documents:

- Withdrawal of DNS for Smith Island Restoration Project, June 2009
- DSEIS Smith Island Restoration Project, June 2011
- SEPA checklist for Leque Island Setback Levee, November, 2007

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[15] The Board notes SCC 30.67.230 Shorelines of Statewide Significance, states:

> In Snohomish County, shorelines of statewide significance include: Lake Stevens, Spada Lake, Sauk River, North and South Forks of the Stillaguamish River, Snohomish River, Skykomish River (including North Fork), Snoqualmie River, Skagit Bay, Stillaguamish River Estuary and the Snohomish River Estuary. Also included as shorelines of statewide significance are the non-tidal areas of the unincorporated portions of Puget Sound, Possession Sound, Port Gardner, and Port Susan.

However, the relation between these areas and the shorelands of concern to the Farm Bureau is unclear.

[16] At the Hearing on the Merits, Ecology referenced the Board's decision in *Seattle Shellfish, LLC v. Pierce County and Department of Ecology*, CPSGMHB Case No. 09-3-0010, Final Decision and Order (January 19, 2010). That was a split decision by the Board and was subsequently reversed by superior court, so is not persuasive authority.

[17] Petitioner's Motion for Disposition under WAC 243-03-560 [public process] and in the alternative To Supplement the Record under WAC 243-03-565 (Nov.19, 2012).



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The Respondents objected.[18] The Farm Bureau replied with a summary of the facts that form the basis of its concern,[19] supported by three documents:

- Declaration of Ralph Ferguson of Camano Water Systems Association, November 4, 2010, in PCHB Case Nos. 10-124, 10-135, and 10-138 (Consolidated)
- Declaration of Rone Brewer, Vice President, Washington Waterfowl Association, November 4, 2010, in PCHB Case Nos. 10-124, 10-135, and 10-138 (Consolidated)
- WSDOT Declaration of Emergency July 8, 2010 re SR 532 dike repair

The County and Ecology moved to strike the Farm Bureau's Reply and additional attachments as presenting facts outside the record, beyond the scope of the matters raised, and irrelevant to the issues before the Board.[20] The Farm Bureau answered that its Reply and attachments go to the County's *intent* to violate the GMA.[21] In its Order on Motions, the Board reserved decision on the Farm Bureau's motion to supplement and Respondents' motion to strike until after briefing and argument of the issues on the merits.[22]

Petitioner's Opening Brief attached an additional six documents not in the record:

A. Letter dated 11/19/09 from Camano Water Systems Association (CWSA) to WDFW, copied to SnoCo, detailing its concerns and the concerns of its association member, JBWD, with saltwater contamination of the aquifer due to Leque Island restoration projects.

B. Letter dated 1/18/10 from JBWD to WDFW, copied to SnoCo, stating JBWD's concerns with saltwater contamination of the aquifer due to Leque Island restoration projects.

C. Letter dated 5/4/10 from JBWD's attorney, Tom Ehrlichman, to SnoCo detailing JBWD concerns with saltwater contamination of the aquifer due to Leque Island restoration projects.

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[18] Snohomish County and Washington State Department of Ecology's Joint Response to Petitioner's Motion for Disposition and Motion to Supplement the Record (Nov. 28, 2012).
[19] Petitioner's Reply to Respondents' Response to Petitioner's Motion for Disposition and in the alternative to Supplement the Record (Dec. 5, 2012).
[20] Snohomish County's Motion to Strike Petitioner's Reply, Declaration of Ralph Ferguson, Declaration of Rone Brewer, and WSDOT Declaration of Emergency (Dec.7, 2012).
[21] Petitioner's Response to Respondents' Motion to Strike (Dec.10, 2012).
[22] Order on Motions (Dec. 17, 2011), at 10.



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D. Letter dated 5/4/10 from Associated Earth Sciences to SnoCo detailing JBWD concerns with saltwater contamination of the aquifer due to Leque Island restoration projects.

E. WDFW minutes of a 6/30/10 meeting at the WDFW HQ in Mill Creek, WA. These minutes state in paragraph #3 that "County permitting has been delayed by community concerns regarding loss of agricultural land and most recently the potential impacts to ground water."

F. (Index 133 in Case No. 12-3-0010) Petitioner's offered amendments to Ordinance 12-047.

Respondents moved to strike the attachments as not supported by a timely motion to supplement or a showing of good cause.[23] At the hearing on the merits, the Board allowed argument on the motions to supplement and motions to strike.

The Board notes, first, except for the first three documents listed above, the Farm Bureau's exhibits are not supported by motions for supplementation. The Board's rules, at WAC 242-03-565, require that extra-record submissions be supported by a timely motion to supplement the record stating why the documents are necessary to the Board's decision. In the absence of such a motion, the Board's failure to grant the opposing party's motion to strike is reversible error.[24]

Second, most of the exhibits[25] and the extra-record narrative in Petitioner's Reply on Motions concern the threat of saline intrusion into sole-source aquifers as a result of levee removal.[26] The present challenge is focused on whether inundation of designated agricultural resource lands as a result of levee removal is non-compliant with the SMA and

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[23] Respondents' Brief, at 40-41
[24] *Irondale Community Action Neighbors v WWGMHB*, 163 Wn. App. 513, 522, 262 P.3d 81 (2011)
[25] Except WSDOT Declaration of Emergency and Farm Bureau's proposed amendments to Ordinance 12-047
[26] The Board notes the SMP guidelines at WAC 173-26-221(2) contain specific SMP guidance for each type of critical area as defined in the GMA except for critical aquifer recharge areas.



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applicable guidelines. Thus the exhibits and narrative are not likely to be relevant to the issues the Board must decide.

Further, in reviewing the challenged SMP, the Board finds abundant information already in the record documenting the County's consideration of dike and levee removal for habitat restoration purposes.[27] Snohomish County's SMP submittal includes a Restoration Plan replete with proposals for removing dikes and creating marshes, waterways, and aquatic habitat. In addition to being already in the record, the Restoration Plan is a programmatic document, as contrasted to the project-specific documentation proffered by the Farm Bureau. While the proposals in the Restoration Plan don't always specify whether the land to be flooded is designated agricultural resource land, farming is indicated on many of the properties. For example, the Restoration Plan includes a number of Smith Island and Leque Island levee-removal proposals. Thus, to the extent the Farm Bureau seeks to prove the County's intent to pursue habitat restoration on farmland through dike and levee removal, the supplementation request is redundant.

Finally, as to the proposed Item F – Farm Bureau's proposed amendments to Ordinance 12-047 – the Board was reminded at the hearing that these amendments were not offered in connection with adoption of the SMP but in connection with a subsequent comprehensive plan amendment.[28] The SMP was approved by Ecology and became effective July 27, 2012. Item F was submitted to the County Council October 16, 2012. The Board's rules specify "evidence arising subsequent to adoption of the challenged legislation is rarely allowed." [29] The Board finds no reason to make an exception in the present case.

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[27] Index #3.4.5 Restoration Element (Aug. 2010). See, e.g., Estuary/Nearshore, Floodplain and Fish Passage projects in the Stillaguamish River Basin, pp. 25-26 and 64; Estuary Restoration in the Snohomish Basin, pp. 47-49; Snoqualmie River Mainstem (DeJong/Eppinga) acquisition, p. 51; Skykomish River Mainstem, various dike removal and ox-bow reconnection projects, pp. 57-58.

[28] HOM Transcript at 11

[29] WAC 242-03-565(2)



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The Farm Bureau's motion to supplement the record is **denied.** Respondents' motions to strike are **granted**.

### B. Abandoned Issues

The Board's Rules of Practice and Procedure provide: "Failure by [a petitioner] to brief an issue shall constitute abandonment of the unbriefed issue."[30] Also, the Board has stated, "Inadequately briefed issues would be considered in a manner similar to consideration of unbriefed issues and, therefore, should be deemed abandoned." [31] Further, the Board has held, "An issue is briefed when legal argument is provided; it is not sufficient for a petitioner to make conclusory statements, without explaining how, as the law applies to the facts before the Board, a local government has failed to comply with the Act."[32] The County and Ecology urge the Board to dismiss virtually all of the Farm Bureau's allegations of non-compliance as inadequately briefed.

The standard of adequate briefing does not require a stand-alone legal argument for each cited statutory or regulatory provision. Here the Farm Bureau's Legal Issue 1 references numerous provisions alleged, in combination, to show SMA non-compliance and GMA inconsistency. The Bureau's briefing attempts to weave the provisions together in one concise and integrated legal argument which the Board will address on the merits. However, the Board finds no argument supporting alleged non-compliance with RCW 90.58.280 and 90.58.340. These claims are deemed abandoned.

### C. Order of Discussion

The PFR posed four legal issues. Legal Issues 2 and 4 have been dismissed on dispositive motions pursuant to WAC 242-03-560. Legal Issue 3 alleges inconsistency between the

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[30] WAC 242-03-590(1)
[31] *Sky Valley, et al., v. Snohomish County*, CPSGMHB Case No. 95-3-0068c, Order on Motions to Reconsider and Correct (Apr. 15, 1996), at 3.
[32] *Tulalip Tribes of Washington v. Snohomish County*, CPSGMHB Case No. 96-3-0029, Final Decision and Order (Jan. 8, 1997), at 7; *TS Holdings v. Pierce County,* CPSGMHB Case No. 08-3-0001, Final Decision and Order (Sep. 2, 2008), at 7-8.



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"shorelands" definition in the County's SMP and the definition in the SMA. The Board's discussion resolves this issue first.

Legal Issue 1 concerns the County's SMP provisions allowing restoration activities such as levee removal which could result in inundation of farm lands. The Board addresses, first, claims with respect to shorelines of statewide significance; next, consistency with the County's comprehensive plan and development regulations; and finally, compliance with the indicated SMA provisions.

## IV. THE CHALLENGED ACTION

With Ordinance 12-025 Snohomish County adopted and Ecology approved the Snohomish County Shoreline Management Program 2012 Update. The Snohomish County Farm Bureau took issue with County proposals to restore salmon habitat along certain rivers and coastal shorelines by removing or setting back dikes and levees. The Farm Bureau asserts the lands to be inundated by the restoration projects are designated agricultural resource lands which the GMA and Snohomish County Comprehensive Plan require to be preserved. The Farm Bureau also contends the County's definition of shorelands is over-expansive, including the entire floodplains of major rivers. Virtually all of the County's shorelands – floodplains, delta lands, marine shores – are designated agricultural resource lands, according to the Farm Bureau, [33] and it protests that the piecemeal loss of farm land through inundation threatens the viability of the agriculture industry.[34]

## V. LEGAL ISSUES AND DISCUSSION

### A. Legal Issue 3 – "Shorelands"

The Prehearing Order sets forth Legal Issue 3 as follows:

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[33] HOM Transcript at 25. 34. The County at the hearing orally confirmed a rough correlation, HOM Transcript at 71-72, but neither party provided the Board with maps or other citation to the record demonstrating the overlap of agricultural designations and shorelands.

[34] The Board notes the County subsequently adopted amendments to its comprehensive plan in Ordinance 12-047 designed to harmonize support for agriculture with habitat restoration. The Farm Bureau has challenged Ordinance 12-047 in Case No. 12-3-0010, which has not yet been heard.



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Does Ordinance 12-025 fail to comply with RCW 90.58.030(2)(f) and RCW 90.58.065(3) because SCC 30.91S.181 in section 93 (at p. 154) of Ordinance 12-025 rejects the RCW 90.58.030(2)(f) statutory definition of "shorelands" in favor of a different definition of its own creation?

Applicable Law

The SMA defines "shorelands" in RCW 90.58.030(2)(d):

> "Shorelands" or "shoreland areas" means those lands extending landward for two hundred feet in all directions as measured on a horizontal plane from the ordinary high water mark; floodways and contiguous floodplain areas landward two hundred feet from such floodways; and all wetlands and river deltas associated with the streams, lakes, and tidal waters which are subject to the provisions of this chapter; the same to be designated as to location by the department of ecology.
>
> (i) Any county or city may determine that portion of a one-hundred-year-flood plain to be included in its master program as long as such portion includes, as a minimum, the floodway and the adjacent land extending landward two hundred feet therefrom. (Emphasis added)

Snohomish County's SMP Update defines "shorelands" at SCC 30.19S.181:[35]

> "Shorelands" means those upland areas associated with shorelines of the state including:
> (1) Uplands extending landward for 200 feet in all directions as measured on a horizontal plane from the ordinary high water mark;
> (2) Floodways and 100-year floodplains; and
> (3) All wetlands and river deltas associated with shorelines of the state.

Positions of the Parties

The Farm Bureau contends the County has no authority to vary from the definition in the statute.[36] The Farm Bureau asserts "the County is using definition to make a jurisdictional grab for the whole floodplain," in the face of the statutory definition which restricts SMA

[35] Emphasis added. The County points out this definition is not changed from its 1994 SMP; see Index #4.3.2 at 4-5.
[36] Petitioner's Opening Brief at 20, citing *City of Spokane Valley v. Spokane County*, 145 Wn. App. 825, 187 P.3d 340 (2008).



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"shorelands" to the portion of the floodplain extending landward 200 feet from the floodway.[37]

Respondents contend Legal Issue 3 must be dismissed because the shorelands definition is not found in RCW 90.58.030(2)(f), as stated in the legal issue, but in RCW 90.58.030(2)(d).[38] Further, RCW 90.58.030(2)(d)(i) expressly allows a local SMP to include the whole floodplain.

Board Discussion and Analysis

The appellant has the burden of proof in an appeal of a SMP. RCW 90.58.190(2)(d). Correctly identifying the statutory basis for the challenge is a necessary threshold requirement. The Board understands that typographical errors early in the process are easy to perpetuate.[39] However, at a minimum, the petitioner is responsible for re-reading the applicable statutes in the course of drafting the prehearing brief so that inadvertent errors are caught and corrected. Here, the Farm Bureau failed to note the error until the Respondents' brief called it out.

Further, the Farm Bureau mistakenly relies on RCW 90.58.065(3) which states that "[Ecology] and local governments shall assure that local governments use definitions consistent with the definitions in this section." The "definitions in this section" are the definitions of "agricultural activities," "agricultural products," "agricultural equipment," and "agricultural land" found at RCW 90.58.065(2). The RCW 90.58.065(3) directive for consistent use of agriculturally-related definitions does not create a requirement that definitions of "shorelands" in the SMA and in the County's SMP must be identical.

Finally, the Farm Bureau's argument of inconsistency fails on the merits. The SMA "shorelands" definition expressly provides for a more expansive designation of shorelands. Under RCW 90.58.030(2)(d)(i) the local jurisdiction has the option of including the entire

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[37] Petitioner's Reply, at 3
[38] Respondents' Brief, at 35-38.
[39] As noted below, in reference to the RCW 90.58.190(2)(b) citation of RCW 36.70A.040(4), even the Legislature may be capable of inadvertently perpetuating incorrect citations.



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floodplain so long as it includes, at a minimum, "the floodway and the adjacent land extending landward two hundred feet therefrom."[40] Snohomish County's decision to include the entire floodplain as designated shorelands and to provide that designation in its definitions is consistent with RCW 90.58.030(2)(d).

The Board notes Ecology's Findings and Conclusions in its final approval of the County's SMP state:[41] "Another key feature of the County SMP update is the inclusion of the 100 year floodplain within shoreline jurisdiction." Ecology notes inclusion of the floodplain was part of the County's previous SMP but the 2012 Update provides more protective regulations: "Given that the new SMP is a significant upgrade from the existing program, it is expected that future degradation of ecological functions will be reduced and avoided within the 100 year floodplains of the Snohomish and Stillaguamish basins under the new program." Ecology also acknowledges inclusion of the whole floodplain includes more agricultural land. "Snohomish County includes entire floodplains within shoreline jurisdiction. This greatly contributes to the resource environment [i.e., agriculture and forestry] being the predominant shoreline classification under the SMP update."[42]

The Board concludes the Farm Bureau has failed to demonstrate the County's definition of "shorelands" to include floodplains, and Ecology's approval, violates RCW 90.58.030(2) or RCW 90.58.065(3).

Conclusion

The Board finds and concludes the Farm Bureau has failed to meet its burden of demonstrating non-compliance with RCW 90.58.030(2) and RCW 90.58.065(3). Legal Issue 3 is **dismissed.**

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[40] Ecology points to its handbook: http://www.ecy.wa.gov/programs/sea/shorelines/smp/handbook/Chapter5.pdf at 16-19 (describing minimum jurisdiction as "the floodway plus contiguous floodplain extending 200 feet landward from the floodway" and maximum jurisdiction as "the entire 100-year floodplain.").

[41] Index #4.3.2, Findings and Conclusions for Proposed Amendments to the Snohomish County Shoreline Master Program Update, (Feb. 28, 2012), at 4, 5.

[42] Id.



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### B. Legal Issue 1 - Dedesignation

The Prehearing Order sets forth Legal Issue 1 as follows:

> 1. Does Ordinance 12-025 fail to comply with ~~RCW 36.70A.060(1)(a), RCW 36.70A.020(8),~~ RCW 90.58.065(1), RCW 36.70A.070(1) and (5)(c)(v), RCW 90.58.280, RCW 90.58.340, ~~RCW 36.70A.100,~~ the consistency provisions of GMA, SMA, and applicable WACs, and Snohomish County Comprehensive Plan General Policy Plan Goal LU 7 requiring conservation of agricultural land, because the following provisions of Ordinance 12-025:
>    A. use note #27 (at p. 100) to SCC 30.67.440 in section 28;
>    B. SCC 30.67.580(1)(a) and (b) (at p. 128) in section 28;
>    C. SCC 30.67.320 (at p. 95) of section 28;
>    D. SCC 30.67.505 (at p. 103) in section 28; and
>    E. Section 3.2.5.16 at p. 76 of Exhibit A to Ordinance 12-025,
>
> considered in the context of the intent of the County and others to allow and/or cause the destruction of designated agricultural land by saltwater flooding, has the clear practical effect of authorizing the County to permit the destruction of designated agricultural land by flooding with saltwater?[43]

Positions of the Parties

The Farm Bureau argues the SMP Update creates an exception to the GMA requirement to amend the comprehensive plan when agricultural resource lands are de-designated. The Bureau characterizes this exception:

> **Restoration Exception.** Projects for habitat restoration in the shoreline jurisdiction of the SMP which propose flooding of designated agricultural land with saltwater or freshwater need not first re-designate the land to a non-agricultural designation.[44]

The Farm Bureau contends permitting the destruction of prime farmland while bypassing the de-designation process violates GMA requirements. The Bureau also alleges it fails to comply with SMA provisions concerning agricultural lands and activities.

In their joint response, the County and Ecology argue first, that the Farm Bureau has abandoned claims under the various statutory provisions referenced in Legal Issue 1 by

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[43] Strike-throughs indicate issues withdrawn. See Order on Motions, at 2-3.
[44] Petitioner's Opening Brief, at 3.



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failing to provide argument, authorities or discussion of evidence in the record. Further, the Respondents find flaws in each of the Bureau's citations to SMA, SMP or Comprehensive Plan provisions. In sum, they assert there is no legal requirement in either the GMA or SMA that designated agricultural resource lands must be re-designated on the County's GMA comprehensive plan map before shoreline restoration projects can be permitted. [45]

*Compliance with GMA De-Designation Process Requirement*

A first step in land use planning under the GMA is designation and conservation of natural resource lands. RCW 36.70A.040, .060, .170. In Snohomish County's comprehensive plan, agricultural lands of long term commercial significance are designated Commercial Farmland.[46]

The Farm Bureau argues that amendments to land use designations and to SMP provisions require docketing - a comprehensive plan process.[47] Site-specific project review is not a sufficient basis for changing an agricultural designation. Specifically, the docketing process determines whether "any proposed change in the designation of agricultural lands … is consistent with the designation criteria of the GMA and the comprehensive plan."[48] The Farm Bureau contends the SMP Update sets up a "restoration exception" that the County intends to use to allow dike and levee removal that renders prime farmland unusable for agriculture while evading the de-designation analysis.

The Farm Bureau relies on *Lewis County*[49] where the Court approved the Western Board's holding that a county must conserve designated agricultural land and that a county's agricultural land use regulations allowing specific non-farm uses of farm land may be

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[45] Respondents' Brief, at 12
[46] See, *Pilchuck VI v. Snohomish County*, CPSGMHB Case No. 06-3-0015c, Final Decision and Order (Sep. 15, 2006), at 41, noting three commercial agriculture designations in the Snohomish County comprehensive plan: Local Commercial Farmland (approximately 3,613 acres), Upland Commercial Farmland ( 639 acres), and Riverway Commercial Farmland (58,778 acres).
[47] Petitioner's Opening Brief, at 5, citing RCW 36.70A.470 and SCC 30.74.010(2)(h).
[48] SCC 30.74.030(1)(b)
[49] 157 Wn.2d 488, 507-508.



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invalidated if they are not fashioned in such a way as to ensure that they do not substantially interfere with the GMA goal of maintaining and enhancing the agricultural industry.

The Farm Bureau argues the GMA requirement for a de-designation process when agricultural resource lands are converted to different use serves two essential purposes. First, docketing is a legislative process, requiring public notice and hearing, thus allowing advocates for agriculture a voice in the decision.[50] Second, de-designation reviews the cumulative effect on the agricultural industry in an area rather than simply an individual owner's intent to put a parcel to a different use.[51]

The Board finds the GMA requirement for a comprehensive plan amendment to de-designate agricultural resource lands is corollary to the first-priority requirement for designation and mapping of resource lands. RCW 36.70A.060, .170. The analytical process for de-designation is spelled out in decisional law and is articulated in the Department of Commerce minimum guidelines.[52] Under the GMA, the same substantive criteria are applied in considering de-designation of agricultural resource lands as for their original designation.[53]

However, as to shorelines of statewide significance, the Board's review of Shoreline Master Programs is limited to whether "the decision of the department is inconsistent with the policy of RCW 90.58.020 and the applicable [SMP] guidelines."[54] The Board is not permitted to assess compliance with GMA resource land designation and conservation provisions. There

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[50] Other interested entities, such as water districts depending on sole source aquifers underlying land proposed for saltwater inundation, would have an opportunity to be heard. Petitioner's Opening Brief, at 6-7.
[51] None of the parties pointed to any analysis in the record of the effect of parcel-by-parcel inundation on the farm economy. The County acknowledged at the HOM the potential threat to agricultural industry in an area but speculated that a farmer's decision to sell to a conservation organization was a per se demonstration that farming was not economically viable or was marginal on that property. HOM Transcript, at 67, 70.
[52] WAC 365-190-040(10); WAC 365-190-050; WAC 365-196-815(1)(b) and (c)
[53] *City of Arlington v. Central Puget Sound Growth Management Hearings Bd.*, 164 Wn.2d 768, 780-81, 193 P.3d 1077, 1083-84 (2008).
[54] RCW 90.58.190(2)(c)



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are no provisions in RCW 90.58.020 or the SMP guidelines concerning designation or dedesignation of agricultural land. The Respondents explain: "the SMP Update does not speak to the designation of agricultural land because designation of agricultural land is not within the scope of the SMA."[55] The Board finds the Farm Bureau is unable to meet its burden of providing "clear and convincing evidence" that Ecology's approval of the County's SMP Update – even if it had the effect of de-designating agricultural land - violates the policy of RCW 90.58.020 or the SMP guidelines. Thus, as to shorelines of statewide significance, the Board must uphold the decision of Ecology.

The Board's review of SMP provisions concerning shorelines is somewhat broader. RCW 90.58.190(2)(b) requires consideration of "the requirements of the SMA, the policy of RCW 90.58.020 and the applicable guidelines, and the internal consistency provisions of RCW 36.70A.070, 36.70A.040(4), 35.63.125, and 36A.63.105." The de-designation process for agricultural lands is not an SMA requirement, but as to SMP provisions concerning shorelines, the Board is directed to assess internal consistency of the SMP with GMA plans and regulations, as discussed below.

*Compliance with GMA Internal Consistency Provisions*

RCW 36.70A.070 (preamble) describes the prescribed elements of a comprehensive plan and mandates that an adopted plan and its future land use map (FLUM) be internally consistent. In addition, RCW 36.70A.040(3) and (4) require that development regulations be consistent with and implement the comprehensive plan. An adopted shoreline master program is part of both the comprehensive plan and development regulations of a county or city. RCW 36.70A.480(1) provides:

> The goals and policies of a shoreline master program for a county or city adopted under chapter 90.58 RCW shall be considered an element of the county or city's comprehensive plan. All other portions of the shoreline master program for a county or city adopted under chapter 90.58 RCW, including use regulations, shall be considered a part of the County's development regulations.

[55] Respondents' Brief, at 12.



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Thus the goals and policies of the County's SMP Update must be consistent with the other policies of its comprehensive plan. Other portions of the SMP Update are part of the County's development regulations and such regulations must be consistent with the comprehensive plan. The Board looks first at comprehensive plan internal consistency, then at regulatory consistency.

Comprehensive Plan Internal Consistency. The Farm Bureau asserts the GMA requires counties to designate and conserve agricultural resource lands, citing RCW 36.70A.070(1), .040(3)(b), and .170(1)(a).[56] Snohomish County's agricultural designations are part of its comprehensive plan, specified in the text and depicted on the FLUM. The Bureau points out the County's docketing regulations at SCC 30.74.030(1)(b) require the proponent for re-designation to demonstrate that "[a]ny proposed change in the designation of agricultural lands, forest lands and mineral resource lands is consistent with the designation criteria of the GMA and the comprehensive plan."

The Farm Bureau postulates that flooding of designated farmlands through shoreline restoration measures is in effect a change in use of the land, triggering a land-use re-designation decision process. However, the Bureau has failed to identify a Snohomish County comprehensive plan policy requiring a de-designation process before shoreline restoration activities are undertaken.

The County's comprehensive plan addresses designation and conservation of agricultural resource lands in section LU 7. Designation requires application of the GMA criteria and minimum guidelines:

> **GOAL LU 7 Conserve agriculture and agricultural land through a variety of planning techniques, regulations, incentive and acquisition methods.**

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[56] The Farm Bureau also cites RCW 36.70A.070(5)(c)(v), a provision requiring rural plans to avoid conflicts with agriculture. The provision is inapplicable as the matters at issue here do not involve the County's rural lands.



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**Objective LU 7.A Classify and designate agricultural land of long-term commercial significance.**

LU Policies 7.A.1 The county shall classify and designate farmlands in three classes: Riverway Commercial Farmland, Upland Commercial Farmland, and Local Commercial Farmland as shown on the Future Land Use map and shown in greater detail on a set of assessor's maps which will be part of the implementation ordinances.

**7.A.2** Landowners may request in writing a review of the farmland designations as part of the county's annual GMA comprehensive plan amendment process.

**7.A.3** The county shall designate farmland as required by the GMA, and consider the guidance provided for designating agricultural lands of long term commercial significance adopted by the State. In addition, farmland designations and expansions of such designations on contiguous lands should be made considering all of the following criteria: [list omitted]

Conservation of farmland is required by **Objective LU 7.B Conserve designated farmland and limit the intrusion of non-agricultural uses into designated areas.** However, LU 7.B does not address encroachment for restoration purposes.

Potential for conversion of farmland for habitat restoration is addressed in Policy 7.D.9:

> **7.D.9** The county shall investigate programs that have the potential to convert farmland for habitat restoration, mitigation or flood storage and their resulting long term effects on agriculture. This investigation shall provide the basis for a subsequent analysis of the effects of such programs on farmland and shall be followed with appropriate policies and regulations to protect designated commercial farmlands.

Plainly, the County's comprehensive plan contemplated farmland inundation for fish habitat and flood impoundment. Conversion of farmland for shoreline restoration purposes is consistent with Policy LU7.D.9 if the County has "evaluated the long term effects on agriculture" and enacted "appropriate policies and regulations to protect designated commercial farmlands." In the record before us, the Farm Bureau attacks the County for failing to require a de-designation process when restoration modifies the shoreline. The



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Board does not read LU7.D.9 – or other provisions of Goal LU7 – to require such a process, and the Bureau's objection fails.[57]

In sum, the Farm Bureau fails to demonstrate the SMP Update is inconsistent with the goals and policies of the County Comprehensive Plan in LU 7.

Regulatory Consistency. Consistency with County development regulations presents a more difficult question. RCW 90.58.190(2)(b) limits the Board's scope of review to "the consistency provisions of … [RCW] 36.70A.040(4), 35.63.125, and 35A.63.105." The Board notes, first, the Farm Bureau has not listed any of these statutes in Legal Issue 1 as a basis for non-compliance. Rather, Legal Issue 1 refers generally to the "consistency provisions of GMA." More troubling, none of the statutes included in the scope of review for regulatory consistency is applicable here.[58]

RCW 36.70A.040 is titled: **Who must plan – Summary of requirements – Development regulations must implement comprehensive plans.** The provision contains separate sections with deadlines for counties and cities to adopt their initial GMA plans and development regulations.[59] Subsection (3) sets the deadlines for initially-planning counties and cities to adopt plans and "development regulations that are consistent with and implement the comprehensive plan." Subsection (4) sets the deadlines for opt-in counties to "adopt a comprehensive plan and development regulations that are consistent with and implement the comprehensive plan." Snohomish County is an initially-planning county; thus,

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[57] The Board notes, however, that the County has not provided any information from the record consistent with LU7.D.9 showing its evaluation of cumulative effects on the agricultural industry from shoreline restoration activities or of its policies and regulations to protect commercial farmlands in the face of such activities. The Farm Bureau's brief did not raise the LU7.D.9 question, and the Board cannot make the Bureau's argument for it.

[58] The Board discusses the scope of review further because this is the first case before the Board presenting these questions.

[59] RCW 36.70A.040 concerns the initial adoption of GMA development regulations. RCW 36.70A.130(1)(d) is the provision expressly requiring subsequent amendments and additions to regulations to be consistent and implement the plan. *Peranzi v. City of Olympia*, WWGMHB Case No. 11-2-0011, Final Decision and Order (May 4, 2012), at 6-7.



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the regulatory consistency requirements of RCW 36.70A.040(4) do not apply to the County's SMP Update.[60]

**RCW 35.63.125 – Development regulations – Consistency with comprehensive plan –** applies to "each city and county that does not plan under RCW 36.70A.040."

**RCW 35A.63.105 – Development regulations – Consistency with comprehensive plan –** applies to "each code city that does not plan under RCW 36.70A.040."

Snohomish County plans under the GMA, and the regulatory consistency requirements of RCW 35.63.125 and 35A.63.105 do not apply. Further, construing and applying these statutes is not within the Board's jurisdiction as defined in RCW 36.70A.280(1)(a).

In sum, none of the statutes cited in RCW 90.58.190(2)(b) as a basis for Board review of SMP regulatory consistency is applicable to the County's SMP Update.

However, the Board's scope of review set forth in RCW 90.58.190(2)(b) also includes "the requirements of [SMA] … and the applicable guidelines." The SMP guidelines echo the instructions of the SMA at RCW 90.58.080(4)(b) which states the purpose of the 7-year local review of master programs is "to assure consistency of the master program with the local government's comprehensive plan and development regulations adopted under chapter 36.70A RCW." The SMP guidelines underscore this requirement for regulatory consistency. WAC 173-26-186 establishes eleven governing principles, including:

> (7) The planning policies and regulatory provisions of master programs and the comprehensive plans and development regulations adopted under RCW 36.70A.040 shall be integrated and coordinated in accordance with RCW 90.58.340.

WAC 173-26-191(1) sets forth master program concepts, including:

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[60] Respondents' Brief, at 24



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> (e) Consistency with comprehensive planning and other development regulations. For cities and counties planning under the Growth Management Act, chapter 36.70A RCW requires mutual and internal consistency between the comprehensive plan elements and implementing development regulations, including master programs.

WAC 173-26-211(3) provides criteria for assuring "shoreline environment designation, local comprehensive plan land use designations, and development regulations to be internally consistent."

The Board deems it unlikely the Legislature intended to exempt GMA's initially-planning counties and cities from review of consistency between SMP regulatory provisions and GMA development regulations. However, the scope of review set forth in RCW 90.58.190(2)(b) apparently provides such an exemption. While the Board must question whether it has jurisdiction to address regulatory consistency, assuming it does, for purposes of discussion, the Board would find the Farm Bureau has failed to meet its burden here. First, although the Bureau's opening brief references regulatory consistency requirements of RCW 36.70A.040(3) and (4) and RCW 36.70A.130(1)(d), none of these provisions are identified in Legal Issue 1 as bases for alleged non-compliance. Further, as discussed below, the SMP Update classifies shoreline restoration projects as "modification" activities, not "land use" changes. Thus for SMA purposes, restoration activities do not trigger the docketing requirement in the County's GMA regulatory provisions relied on by the Farm Bureau.

*Compliance with RCW 90.58.065*

**RCW 90.58.065 Application of guidelines and master programs to agricultural activities** provides:

> (1) The guidelines adopted by the department and *master programs* developed or amended by local governments according to RCW 90.58.080 *shall not require modification of or limit agricultural activities* occurring on agricultural lands. In jurisdictions where agricultural activities occur, master programs developed or amended after June 13, 2002, shall include provisions addressing new agricultural activities on land not meeting the definition of agricultural land, *conversion of agricultural lands to other uses*, and



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development not meeting the definition of agricultural activities.[61] (Emphasis supplied)

"Shall not limit agricultural activities." The statute states master programs "shall not require modification of or limit agricultural activities" on agricultural lands. The County and Ecology insist all of the proposed restoration programs are voluntary, thus no farmer will be required to limit agricultural activities as a result of dike removal and inundation. It appears to the Board the County and Ecology mis-read the statute. The plain grammatical structure of this provision[62] indicates master programs shall not

**require** modification of
or
**limit**
agricultural activities occurring on agricultural lands.

The County and Ecology read the statute to state that

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[61] RCW 90.58.065 contains the following definitions:
(2) For the purposes of this section:
(a) "Agricultural activities" means agricultural uses and practices including, but not limited to: Producing, breeding, or increasing agricultural products; rotating and changing agricultural crops; allowing land used for agricultural activities to lie fallow in which it is plowed and tilled but left unseeded; allowing land used for agricultural activities to lie dormant as a result of adverse agricultural market conditions; allowing land used for agricultural activities to lie dormant because the land is enrolled in a local, state, or federal conservation program, or the land is subject to a conservation easement; conducting agricultural operations; maintaining, repairing, and replacing agricultural equipment; maintaining, repairing, and replacing agricultural facilities, provided that the replacement facility is no closer to the shoreline than the original facility; and maintaining agricultural lands under production or cultivation;
(b) "Agricultural products" includes but is not limited to horticultural, viticultural, floricultural, vegetable, fruit, berry, grain, hops, hay, straw, turf, sod, seed, and apiary products; feed or forage for livestock; Christmas trees; hybrid cottonwood and similar hardwood trees grown as crops and harvested within twenty years of planting; and livestock including both the animals themselves and animal products including but not limited to meat, upland finfish, poultry and poultry products, and dairy products;
(c) "Agricultural equipment" and "agricultural facilities" includes, but is not limited to: (i) The following used in agricultural operations: Equipment; machinery; constructed shelters, buildings, and ponds; fences; upland finfish rearing facilities; water diversion, withdrawal, conveyance, and use equipment and facilities including but not limited to pumps, pipes, tapes, canals, ditches, and drains; (ii) corridors and facilities for transporting personnel, livestock, and equipment to, from, and within agricultural lands; (iii) farm residences and associated equipment, lands, and facilities; and (iv) roadside stands and on-farm markets for marketing fruit or vegetables; and
(d) "Agricultural land" means those specific land areas on which agriculture activities are conducted.
(3) The department and local governments shall assure that local shoreline master programs use definitions consistent with the definitions in this section.

[62] See, e.g., *Harmon v Dep't of Soc. and Health Servs.*, 134 Wn.2d 523, 530, 951 P.2d 770(1998); "If the language of a statute is plain and unambiguous, we derive its meaning from the language of the statute itself."



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master programs shall not
**require** modification ~~of~~
or
**limit[ation** of]
agricultural activities occurring on agricultural lands

The Respondents' Brief repeatedly and insistently re-words the statutory provision from "shall not … limit agricultural activities" to "shall not require the limitation of agricultural activities."[63] According to the Respondents, because the SMP Update does not require a farmer to limit farming to give way to restoration, the statute is satisfied. They point out the proposed dike and levee removals are with the voluntary consent of landowners.

The Farm Bureau contends that flooding farm land with salt water limits the use of that land for agricultural production, whether with the owner's consent or not.[64] The Board agrees. However, while the Respondent's argument is not based on sound grammar, even a correct parsing of the statutory provision does not support the Farm Bureau's case. The SMA mandate that "master programs … shall not … limit agricultural activities occurring on agricultural lands" is followed by a definition of agricultural lands: "'Agricultural land' means those specific land areas on which agricultural activities are conducted."[65] Thus, if the land is no longer being farmed, even if it is GMA-designated commercial farmland, a restoration program that removes a levee and inundates the land does not "limit agricultural activities

[63] Respondents' Brief, at 28-30: "a master program may not require the modification or limitation of ongoing agricultural activities;" "nowhere does the [SMP] require ongoing agricultural activities to be changed or limited in any way;" "none [of the cited provisions] require the modification or limitation of agricultural activities;" "require the modification or limitation of agricultural activities;" "nothing in this new code section requires the limitation or modification of ongoing agricultural activities in any way;" "The goals and policies of the comprehensive SMP Update [do not] require the modification or limitation of on-going agricultural activities."
[64] By contrast, the SMP Update contains policies at Section 3.2.5.1 allowing new agricultural activity on shorelands not currently being farmed, with a goal to "preserve prime agricultural soils" and policies assuring that shoreline restoration activities on this land will be voluntary (Policy 7) and agricultural activities will not be limited (Policy 8). [SMP at pp. 53-54].
[65] RCW 90.58.065(2)(d)



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occurring on agricultural lands" as defined in the SMA. The Farm Bureau fails to prove a violation of this provision.[66]

Conversion to other uses.

RCW 90.58.065 requires master programs "shall include provisions addressing … conversion of agricultural lands to other uses." The SMP Update provides:[67] "Conversion of agricultural land within shoreline jurisdiction to other non-agricultural uses is subject to the use restrictions in chapter 30.67 SCC, Parts 400 and 500." The Farm Bureau cross-references these provisions and points out that restoration is a permitted use under the conversion matrix. Further, the Bureau notes the SMP use matrix has a special exemption for restoration projects: "shoreline habitat restoration and enhancement projects do not have to be identified on the use matrices in chapter 30.22 SCC to be permitted in shoreline jurisdiction."[68] Objecting to this exemption, the Bureau insists that where restoration means breaching a dike and converting farmland to marsh or aquatic habitat, a change of use has occurred.

The Board notes the SMP Update treats restoration activities as "shoreline modification," not as land use. The conversion matrix referred to by the Bureau is a "Land Use or Modification" matrix.[69] SCC 30.67.580(2) provides:

> Shoreline habitat restoration and enhancement is permitted in all shoreline environments. Shoreline modifications that are an integral and necessary component of shoreline habitat restoration and enhancement projects are allowed in all shoreline environment designations subject to the appropriate modification-specific shoreline regulations.

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[66] In contrast, under the GMA, landowner intent is not a controlling factor in designation or de-designation of prime farmland. *City of Redmond v. CPSGMHB*, 136 Wn.2d 38, 53, 959 P.2d 1091 (1998).
[67] SCC 30.67.505
[68] Petitioner's Opening Brief, at 10-11, citing Use Matrix note #27 to SCC 30.67.440 in section 28 of Ordinance 12-025 (at p. 100) and SCC 30.67.430(2) in Ordinance 12-025 (at p. 98).
[69] SCC 30.67.400



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This is in accord with the SMP guidelines which differentiate shoreline modifications from shoreline uses. Modifications are addressed in WAC 173-26-231 which begins:

> (1) Applicability. Local governments are encouraged to prepare master program provisions that distinguish between shoreline modifications and shoreline uses.

Section 231 addresses shoreline modifications such as shoreline stabilization, dredge and fill, breakwaters and dune management, concluding with shoreline habitat and natural systems enhancement projects:

> (g) Shoreline habitat and natural systems enhancement projects include those activities proposed and conducted specifically for the purpose of establishing, restoring, or enhancing habitat for priority species in shorelines…. Such projects may include shoreline modification actions … provided that the primary purpose of such actions is clearly restoration of the natural character and ecological functions of the shoreline. Master program provisions should assure that the projects address legitimate restoration needs and priorities and facilitate implementation of the restoration plan developed pursuant to WAC 173-26-201(2)(f).

Shoreline uses are addressed in WAC 173-26-241 which includes provisions concerning agriculture at WAC 173-26-241(3)(a).

The Board finds the SMP Update includes provisions addressing conversion of agricultural lands to other uses, at SCC 30.67.400 and .505.[70] The Bureau objects that the SMP farmland conversion provisions allow inundation as a permitted use and so conflict with the GMA requirement for a de-designation process.[71] The Board is not persuaded. Shoreline restoration projects generally involve modification activities, such as removal of bank armoring, revegetation, breaching of dikes, dredging or fill. The Bureau cites no authority

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[70] See also 3.2.5.1, at p. 53: Conversion of agricultural lands to other uses is regulated in accordance with the standards for the new use (chapter 30.67 SCC, Part 500). Agricultural land in shoreline jurisdiction may be converted only to a use that is allowed in this SMP (chapter 30.67 SCC, Part 400) and which is allowed pursuant to county zoning regulations (chapter 30.22 SCC).

[71] The Bureau also proposed at hearing that "provisions addressing conversion" ought to include a decision process that parallels the de-designation process, with public notice and hearings. HOM Transcript, at 78-79



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requiring the County to classify such activities or their results as land use conversions. Rather, the Board defers to Ecology's construction of its regulations on this question.[72]

The Farm Bureau also asserts that "shoreline restoration" is a mis-characterization of some of the proposed levee removals, as inundation may establish new tidal or fresh water shores not congruent with pre-settlement land patterns.[73] The Board notes the goal of SMA restoration planning is "to achieve overall improvements in shoreline ecological functions over time," not to replicate pre-settlement conditions in discrete shoreline reaches.[74] Thus, a County might choose to enhance salmon survival by shoreline modifications creating new salmon habitat in an area not previously inundated in order to achieve overall improvements in aquatic productivity over time.

*Compliance with RCW 90.58.280*

RCW 90.58.280 provides:

> The provisions of this chapter shall be applicable to all agencies of state government, counties, and public and municipal corporations and to all shorelines of the state owned or administered by them.

The Respondents acknowledge the provisions of the SMA are applicable in this case. The Board finds no argument in the Petitioner's Opening Brief specifying how either the County's adoption or Ecology's approval of the SMP Update violates RCW 90.58.280. Rather, the Bureau contends that Ecology is obligated to comply with the County's comprehensive plan, citing RCW 36.70A.103.[75] The Farm Bureau's claim of non-compliance with RCW 90.58.280 is deemed abandoned.

*Compliance with RCW 90.58.340*

**RCW 90.58.340 Use policies for land adjacent to shorelines, development of.**

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[72] Considerable deference is due an agency's interpretation of its own regulations. *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 86, 11 P.3d 726 (2000).
[73] HOM Transcript at 74-75.
[74] WAC 173-26-201(2)(f)
[75] Petitioner's Opening Brief, at 13.



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provides in full:

> All state agencies, counties, and public and municipal corporations shall review administrative and management policies, regulations, plans, and ordinances relative to lands under their respective jurisdictions adjacent to the shorelines of the state so as the [to] achieve a use policy on said land consistent with the policy of this chapter, the guidelines, and the master programs for the shorelines of the state. The department may develop recommendations for land use control for such lands. Local governments shall, in developing use regulations for such areas, take into consideration any recommendations developed by the department as well as any other state agencies or units of local government.

The Board finds no argument in the Petitioner's Opening Brief indicating in what way the SMP Update fails to achieve a use policy on lands adjacent to shorelines consistent with the policy of the SMA and the SMP guidelines. Indeed, the Farm Bureau's contention is that the County's SMP use policies for agricultural lands adjacent to shorelines are inconsistent with GMA policies and requirements. The Farm Bureau's claim of non-compliance with RCW 90.58.340 is deemed abandoned.

Conclusion

The Board finds and concludes the Farm Bureau has failed to meet its burden of demonstrating non-compliance with RCW 90.58.065(1), RCW 36.70A.070(1) and (5)(c)(v), RCW 90.58.280, RCW 90.58.340, the consistency provisions of GMA, SMA, and applicable WACs, and Snohomish County Comprehensive Plan General Policy Plan Goal LU 7. Legal Issue 1 is **dismissed.**

On the record before us,[76] the Board recognizes that this outcome cannot be read as compatible with the GMA resource lands provisions or the Department of Commerce Minimum Guidelines, but it appears to be all that is within the authority of the Board under the SMA.[77]

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[76] The Board has not yet heard the challenge to the County's comprehensive plan amendments in Case No. 12-3-0010 purporting to harmonize agricultural and salmon restoration policies.
[77] See concurring opinion of Board members William Roehl and Cheryl Pflug.



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## VI. ORDER

Based upon review of the Petition for Review, the briefs and exhibits submitted by the parties, the SMA and applicable guidelines, prior Board orders and case law, having considered the arguments of the parties and having deliberated on the matter, the Board ORDERS:

1) To the extent the Snohomish County 2012 Shoreline Master Program Update concerns shorelines of statewide significance, the Petitioner has failed to carry its burden of proof in demonstrating that Snohomish County's adoption and Ecology's approval of Amended Ordinance No. 12-025 violates the policies of RCW 90.58.020 and the guidelines of WAC Ch. 173-26.

2) To the extent the Snohomish County 2012 Shoreline Master Program Update concerns shorelines, the Petitioner has failed to carry its burden of proof in demonstrating that Snohomish County's adoption and Ecology's approval of Amended Ordinance No. 12-025 violates RCW 90.58.030(2), RCW 90.58.065, RCW 36.70A.070(1) and (5)(c)(v), RCW 90.58.280, RCW 90.58.340, the consistency provisions of GMA, SMA, and applicable WACs, and Snohomish County Comprehensive Plan General Policy Plan Goal LU 7.

3) Legal Issues 1 and 3 are **dismissed.**

4) The matter of *Snohomish County Farm Bureau v. Snohomish County and Washington State Department of Ecology,* Case No. 12-3-0008*,* is **dismissed** and the case is **closed**.

Dated this 14th day of March, 2013.

_____

Margaret A. Pageler, Board Member

**Concurring Opinion of Board Members William Roehl and Cheryl Pflug.**

We concur in the analysis and decision set forth above as it is one that we believe is dictated by the applicable SMA and GMA statutes. However, the Snohomish County Farm Bureau has raised an issue which we believe should be addressed by the departments of



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Commerce[78] and Ecology[79] and possibly by the Legislature. That issue is but one facet of the ongoing difficulty of balancing the interests and needs of agriculture with those of anadromous fisheries[80]: whether a local jurisdiction may allow RCW 36.70A.170 designated agricultural land to be inundated pursuant to the SMA (Chapter 90.58 RCW), resulting in loss of agricultural productivity, without first dedesignating such land.

The GMA goals are often inconsistent and, on occasion, conflicting as illustrated by RCW 36.70A.020(8) and (10):

> (8) Natural resource industries. Maintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries. Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses.
>
> (10) Environment. Protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water.

For example, enhancement of the state's agricultural industry may at times be inconsistent with the goal of enhancing water quality. Compounding the potential for such tension is the fact the goals and policies of the Shoreline Management Act are included as one of the fourteen goals of the Growth Management Act.[81] While the SMA goals and policies as set forth in RCW 90.58.020 are considerably more nebulous than the GMA goals, the potential for conflict is clearly evidenced by the case before the Board. One of the GMA goals is to maintain and enhance agriculture while an SMA goal, together with its underlying

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[78] Commerce was directed to adopt guidelines for classification of natural resource lands and critical areas (RCW 36.70A.050) and also provides technical and financial assistance, and has adopted procedural criteria to assist counties and cities in adopting comprehensive plans and development regulations (RCW 36.70A.190).

[79] Ecology is the state agency primarily involved with the SMA. With respect to Shoreline Master Programs, Ecology acts primarily in a supportive and review capacity with an emphasis on providing assistance to local government and on insuring compliance with the policy and provisions of Chapter 90.58 RCW (RCW 90.58.050).

[80] In 2007 the Legislature appointed the William D. Ruckelshaus Center to conduct an examination of the conflicts between agricultural activities and critical area ordinances and propose solutions. That process took considerably longer than anticipated. RCW 36.70A.5601.

[81] RCW 36.70A.480(1):For shorelines of the state, the goals and policies of the shoreline management act as set forth in RCW 90.58.020 are added as one of the goals of this chapter as set forth in RCW 36.70A.020 without creating an order of priority among the fourteen goals.



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guidelines, focuses on preservation and protection of shoreline natural character, its resources and ecology[82] and shoreline restoration.[83] Considerable, productive agricultural acreage in Western Washington is protected from fresh and saltwater inundation by dikes. Removal of those dikes for the purpose of restoring and enhancing "shoreline natural character" poses a direct threat.

The GMA made the designation of agricultural lands (as well as other natural resource lands and critical areas) one of its first priorities. See RCW 36.70A.170(1)(a). That designation requirement was the first mandated step for counties to accomplish, prior to adoption of comprehensive plans and the establishment of urban growth areas. "The significance of agricultural land preservation in the GMA can be seen in the very timing of key actions mandated in the statute."[84] Once agricultural lands were designated under RCW 36.70A.170, RCW 36.70A.060(1) directed counties to adopt development regulations that "assure the conservation of agricultural lands". Additionally, RCW 36.70A.177 suggests counties employ innovative zoning techniques designed to "conserve agricultural land and encourage the agricultural economy".

A statute which further emphasizes the importance the Legislature places on agriculture is RCW 43.21C.011:

> (1) The legislature finds the state's farm and range lands are a unique natural resource that provide for the production of food, fiber, alternative fuels, and other products necessary for the continued welfare of people locally, nationally, and globally. Each year, a significant amount of the state's agricultural land is irrevocably converted from actual or potential agricultural use to nonagricultural use. The continued decrease in the state's agricultural resource land base is threatening the ability of the agricultural industry to produce safe and affordable agricultural products in sufficient quantities to meet our current and future local, regional, and national food and fiber needs, as well as the demands of our export markets.

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[82] RCW 90.58.020
[83] WAC 173-26-201(2)(f)
[84] *City of Redmond v. Central Puget Sound Growth Mgmt. Hearings Bd*., 136 Wn.2d 38, 47, 959 P.2d 1091 (1998).



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> (2) The program and project actions of state agencies, local governments, and persons, in many cases, inadvertently result in the conversion of farmland to nonagricultural uses where alternative actions would be preferred. The legislature declares that it is the policy of the state to identify and take into account the adverse effects of these actions on the preservation and conservation of agricultural lands; to consider alternative actions, as appropriate, that could lessen such adverse effects; and to assure that such actions appropriately mitigate for unavoidable impacts to agricultural resources.

The importance of preservation of agricultural lands in the GMA context has also been addressed on numerous occasions by the appellate courts. See by way of example *King County v. Central Puget Sound Growth Mgmt. Hearings Bd*., 142 Wn.2d 543, 14 P.3d 133 (2000); *Lewis County v. W. Wash. Growth Mgmt. Hearings Bd*., 157 Wn.2d 488, 139 P.3d 1096 (2006); and *Clark County v. W. Wash. Growth Mgmt. Hearings Bd*., 161 Wn.App. 204, 254 P.3d 862 (2011).

The dedesignation of agricultural land (which is typically the first step toward a more intensive land use) is subject to the same analysis as original designation. See *Clark County v. W. Wash. Growth Mgmt. Hearings Bd*., where the Court stated:

> We evaluate whether a dedesignation of agricultural land was clearly erroneous by determining whether the property in question continues to meet the GMA definition of "agricultural land" as defined in *Lewis County*.[85]

In the case before the Board, Snohomish County adopted and the DOE approved an amended Shoreline Management Program, one which the County and DOE admit would allow the County to approve, for example, dike removal resulting in fresh or saltwater

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[85] 161 Wn. App. 204, 234.
The *Clark County* court's footnote to the quoted sentence is informative: "We note that even though a county's comprehensive plan amendments are presumed valid upon adoption . . . a County's previous determinations and designations of land are still relevant to the analysis. A significant goal of the GMA is to identify*, maintain, enhance, and conserve* agricultural lands. (Emphasis in original) . . . this goal suggests there is relevance of a county's previous designation of land as ALLTCS because otherwise there would be no way for a County to maintain and conserve these lands over time. But under the GMA it is unclear, and the legislature may want to consider and provide direction on, what weight a County should give to prior agricultural designations during subsequent comprehensive plan reviews. Based on the goals of maintaining and conserving agricultural lands, it appears the proper weight is deference to the original designation. (Citations omitted)



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inundation of designated agricultural land. Such an action would result in the loss of that land to agricultural production; in effect "dedesignating" the land without any analysis of whether that land continues to meet the GMA definition of agricultural land and without any consideration of the effect on the agricultural industry.

Such authorization avoids or bypasses the dedesignation process, one which possibly the County believes to be overly cumbersome. The effect, however, is to allow the SMA to "trump" the GMA goal of conservation of productive agricultural lands and enhancement of the agriculture industry.

The difficulty, and the conundrum presented by this case, is created by the differences in focus and direction of the GMA and the SMA. Those differences are highlighted by the argument presented by Snohomish County and the Department of Ecology:

> The Farm Bureau's challenge is focused on its unfounded contention that designated agricultural land must be re-designated before a shoreline restoration project may be realized on that land.[86]
>
> Because the SMP Update allows the County to issue permits for shoreline restoration without the requirement of re-designating the agricultural lands to some other land use designation, the Farm Bureau argues, the SMP Update is out of compliance with the GMA and the SMA.
>
> The Farm Bureau's argument is pure fiction. There is no requirement in the GMA, the County's comprehensive plan, or the SMA that there be any such re-designation. Further, the SMP Update does not speak to the designation of agricultural land because designation of agricultural land is not within the scope of the SMA.[87]

The following colloquy took place during the Hearing on the Merits[88]:

Board Member Roehl:

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[86] Snohomish County's and Washington State Department of Ecology's Joint Prehearing Response at pg. 1
[87] Id. at pg. 12
[88] HOM Transcript at pg. 69



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> . . . So doesn't the Shorelines Management Program as adopted by the County allow, maybe not mandate, but allow for destruction of the agricultural industry, without any consideration of dedesignation?

Snohomish County Deputy Prosecuting Attorney Kasting:

> I think yes, it could. But I don't think that's a practical outcome . . .

Shortly thereafter the following comment was made by Assistant Attorney General Wolfman, speaking on behalf of DOE:

> My point to the beginning when we argued about the exhibits in the preliminary matters is that it's not the function of the SMP to speak to the designation of ag lands under the GMA.[89]

The facts of this case clearly highlight the tensions between the GMA mandated goal of maintaining and enhancing the agriculture industry and an SMA goal of restoring natural shorelines.[90] In this particular instance, the County's amended shoreline master program has been crafted in a manner which allows the probable permanent removal of designated agriculture natural resource land without any consideration of the impact of such a decision on the agriculture industry, a result which would not be tolerated under a GMA analysis. Interestingly, RCW 90.58.065 requires that shoreline master programs "shall include provisions addressing **new agricultural activities** on land not meeting the SMA definition of agricultural land[91] and Snohomish County's SMP does just that. Snohomish County SMP Section 3.2.5.1 includes a goal regarding new agricultural activities designed to "preserve prime agricultural soils" and policies that state: "Agricultural use of designated farmlands should be retained wherever possible"; "Agricultural use . . . should be . . . protected from incompatible and preemptive patterns of development"; that channel modifications adversely affecting agricultural areas should be prohibited; and that agricultural activities on

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[89] Id. at pg. 70

[90] The Board notes that GMA Goal 8 uses the words "maintain and enhance" in reference to agriculture while GMA Goal 14 (RCW 90.58.020) merely states that there is " . . . great concern throughout the state relating to their [the shorelines of the state] utilization, protection, restoration . . . "

[91] RCW 98.58.065(2)(d): "Agricultural land" means those specific land areas on which agriculture activities are conducted.



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agricultural lands should not be limited. To then adopt a SMP that would authorize the inundation of prime farmlands previously designated as natural resource lands under RCW 36.70A.170 ("old" agricultural activities) is seen as tragically ironic.

The Board recognizes the GMA and SMA are intended to be compatible. Petitioner's reasoning may well suggest a more coherent approach to concurrent realization of SMA and GMA goals, but it is simply not based on any existing law applicable to SMP adoption, and the Board does not have the authority to find such integrative direction where none exists. Legislative or judicial clarification of the appropriate balance is needed.

Dated this 14th day of March, 2013.

_____
William Roehl, Board Member (concurring)

_____
Cheryl Pflug, Board Member (concurring)

**Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.[92]**

[92] Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-3-830(1), -840.
A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970.
It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.



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